Territory have to deal with 180 capital punishment cases as of today and it is not possible to lay aside several weeks at a stretch at the expense of these cases. All the prisoners are under remand and some of them have been under remand as far back as 1983. And they await trial for their lives. And while High Court trials go on virtually every day, the number awaiting for trial does not appear to diminish as more prisoners join the queue month after month to await their turn in the docks. Surely priority should be given to these prisoners who await trial for their lives rather than to accused persons who are on bail and who otherwise lead a normal life outside. That is not to say that priority should not be given to the trial of cases of alleged criminal breach of trust of which there has been so much publicity but application should be made before the Sessions Court judges who are bound to use their discretion wisely taking into account the usual matters like the seriousness of the offence, public policy, the number of witnesses and number of counsel involved in the trial, whether dates can be adjusted, *etc.* I do think that where it comes to the Sessions Courts and the High Court it is perhaps easier to have an earlier and a continuous period of hearing before a Sessions Court than before the High Court as there are more Sessions Courts and it is easier to adjust their calendars.

My view is that having regard to all that had been said, the applications should be dismissed and they are accordingly dismissed.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar; Lawrence Dhillon & Associates; Gunaretnam & Co.; Low Hop Bing & Associates.*

ONG BAW SENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Eusoff Chin J.) 14 February 1988]

[Muar – Criminal Appeal No. 51-34/87]

Criminal Law – Gaming – Expert evidence – Expert not called to give evidence in court – Certificate by expert admitted in court – Whether expert should give evidence in court – Common Gaming House Act 1953, s. 11(3) & (5).

The accused was charged under section 4(1)(c) of the Common Gaming House Act 1953 (the Act). He was found guilty by the magistrate's court, was convicted and sentenced to one day's imprisonment and a fine of $8,000.

The main ground of appeal was that the gaming expert was not called to give evidence at the trial. The gaming expert had given a certificate under section 11(3) of the Act certifying that the documents he had examined were master charts and records of stakes relating to illegal character lottery. The certificate was served on the accused and the accused had also served notice to the prosecution under section 11(5)(b) of the Act requiring the presence of the maker of the certificate.

Held, allowing the appeal: (1) section 11(5) of the Act is clear that the gaming expert need not be called by the prosecution to give evidence and that his certificate given under section 11(3) of the Act is admissible in evidence;

(2) however, the gaming expert's certificate cannot be admitted in evidence where the court requires the expert to be present as a witness or where the accused has given proper notice in writing requiring the expert to be present as a witness. Under the circumstances, the certificate should have been rejected by the court. The prosecution therefore had failed to prove a *prima facie* case against the accused;

(3) a retrial would be giving a second chance to the prosecution to prove their case. The trial magistrate should have acquitted the accused at the end of the prosecution's case;

(4) the accused was acquitted and the fine paid by the accused was refunded to him.

Case referred to:

(1) *Chah Siew Kok* v. *Public Prosecutor* [1987] 1 C.L.J. 386 (refd).

CRIMINAL APPEAL.

G.F. Nelson for the appellant.

Nor Afizah Anum (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Eusoff Chin J.: The accused Ong Baw Seng was charged under section 4(1)(c) of the Common Gaming House Act 1953 (hereinafter referred to as "the Act"). He was found guilty by the magistrate's court, was convicted and sentenced to one day's imprisonment and a fine of $8,000. The accused appealed against the conviction and sentence.

The main ground of appeal is that the gaming expert was not called to give evidence at the trial. The gaming expert had given a certificate under section 11(3) of the Act to certify that the documents he had examined were master charts and records of stakes relating to illegal character lottery.

The certificate was properly served upon the accused person under section 11(5) of the Act. About five months before the trial, the defence counsel had served on the Deputy Public Prosecu-

tor a notice under section 11(5)(b) of the Act requiring the presence of the maker of the certificate.

At the hearing, the magistrate admitted the certificate given by the gaming expert as exhibit P2. The expert was not called to give evidence although the Deputy Public Prosecutor had directed the relevant O.C.P.D. to call the gaming expert to give evidence.

At the hearing of the appeal, the learned defence counsel submitted that the certificate, exhibit P2, should have been rejected by the magistrate's court since the maker was not called to give evidence. The learned Deputy Public Prosecutor submitted that the court was satisfied with the authenticity of the certificate, and in any event if the court was not so satisfied, the court could have required the presence of the maker of the certificate to be a witness in court.

Section 11(3) and (5) of the Act states:

"11.(3) Where evidence or a certificate is given by a gaming expert that any document produced before the court is a lottery ticket of any public lottery or is an account, memorandum, riddle or record of stakes or wagers in or relating to any public lottery, the court shall presume that such a document is a lottery ticket of such public lottery or an account, a memorandum, riddle or record of stakes or wagers in or relating to such public lottery, as the case may be.

(5) A certificate given under subsection (3) shall, where the prosecution intends to give it in evidence, be served upon the accused not less than fourteen clear days before the commencement of the trial and the certificate shall be admissible without the presence of the maker thereof as witness unless so required –

(a) by the court; or

(b) by the accused in which case the accused shall give the Public Prosecutor a notice in writing not less than seven clear days before the commencement of the trial."

Section 11(5) of the Act is clear that the gaming expert need not be called to give evidence by the prosecution and that his certificate given under section 11(3) of the Act is admissible in evidence.

However, the gaming expert's certificate cannot be admitted in evidence where the court requires the expert to be present as a witness, or where the accused person has given proper notice in writing requiring the expert to be present as a witness. Under the circumstances, the certificate, exhibit P2, should have been rejected by the court. The prosecution therefore had failed to prove a *prima facie* case against the accused.

In *Chah Siew Kok* v. *Public Prosecutor*[1], a chemist report was served on the defendant who then gave notice to the prosecution under section 399 of the Criminal Procedure Code requiring the presence of the chemist at the trial. The chemist was not called to give evidence at the trial. Peh Swee Chin J. held that the chemist report was inadmissible in evidence.

The learned Deputy Public Prosecutor persuaded me to order a retrial because the failure to call the gaming expert was an oversight on the part of the prosecuting officer in the magistrate's court. With respect, I am unable to agree to this suggestion.

I find the only defect in the prosecution case is the failure to call the gaming expert, and to order a retrial would be giving a second chance to the prosecution to prove their case.

The trial magistrate should have acquitted the accused at the end of the prosecution's case.

I therefore allowed the appeal, and acquitted the accused. The fine paid by the accused should now be refunded to him.

Appeal allowed.

Solicitors: *G.F. Nelson & Co.*